

D R A F T

Approved For Release 2002/05/07 : CIA-RDP83-01004R000100210035-3

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Chief

Dear

With regard to your request for advice on interpretation of the provisions of the Fair Labor Standards Act relating to overtime pay, we are submitting the following information. Some of this has been included in the Notice sent you.

The primary problems involved are the designation of employees as exempt or non-exempt and the determination of what actually constitutes overtime. The non-exempt employees are entitled to overtime under the provisions of the Fair Labor Standards Act or under the provisions of Title 5, U.S. Code, which covers the Civil Service overtime system, which ever provides the higher rate of pay.

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With regard to your employees [] probably the only exemption that would apply is for supervisory employees. Under the Fair Labor Standards Act a supervisor would be one who plans work, assigns work, reviews results and rates employees. Such employees would not be entitled to the overtime provisions of the Fair Labor Standards Act. Your employees who perform monitoring or other technical or clerical work would be considered non-exempt and would be entitled to the overtime provisions of the Fair Labor Standards Act. You should designate your employees "exempt" or non-exempt" on the time and attendance form before sending in. Upon receipt we will review and verify before turning over to the Office of Finance.

Under the Fair Labor Standards Act overtime for non-exempt employees must be paid for all hours actually worked over 40 in a week which the employee "suffers or permits" to be performed. Overtime need not be

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"officially ordered or approved" as is required under the Agency's system.

In effect, this means that you must not permit non-exempt employees to report early and perform work or voluntarily stay after hours to work without compensation. Further, compensatory time cannot be substituted for overtime payment. If an employee comes in early habitually or occasionally, you must insist that he not perform work until the regular workday begins.

The overtime rate is calculated at one and one-half times the employee's regular rate of pay which is determined by including such additional payments as night differential, Sunday premium pay, and post differential. However, since it applies only to all hours over 40 actually worked in a week, it does not include any time on annual, sick or other leave, or holidays.

Since the employee is entitled to the highest rate he will receive under all applicable pay laws, his rate must be computed both under present rules and under the Fair Labor Standards Act provisions with the higher amount being paid. This computation will be made by the Office of Finance. You are responsible only for reporting all pertinent data on the T&A form. Revised forms dating back to 1 May should be made up to report FLSA overtime.

With regard to your question as to whether overtime would be counted only in units of full hours, under the Fair Labor Standards Act lesser periods of time should be counted. Tentatively we have determined that periods of 15 minutes and ⁽¹⁵⁾ should be accumulated and reported for payment when a total of one hour is reached.

With regard to the tying of overtime authorization to some demonstrable increment of work, e.g., a translation, punching a message, repairing a piece of equipment, etc. this, of course, is satisfactory but if the employee is permitted to work overtime it must be understood that he is entitled to overtime pay under the FLSA whether it was authorized or not. This requires you to exercise the utmost diligence to be sure that employees do not work

overtime unless you are willing and able to pay them. Unauthorized overtime will be reported on the T&A form under FLSA-Other heading since this will be used only in computing overtime pay under the FLSA, not under Title 5.

We are not sure exactly how the compliance provisions will apply in the
STATINTL [] however, we must make every effort to assure that the rules established are followed. The law provides that employees may bring civil actions in Federal District Courts if they believe they have not received their rights in accordance with the Act. The Civil Service Commission has determined that employees must exhaust administrative remedies available in the Agency before any such civil action.

As you know, the effective date of the Fair Labor Standards Act provisions is 1 May 1974. Employees will receive a retroactive adjustment if the Office of Finance computation shows a higher amount of overtime pay entitlement under the FLSA than under Title 5.

I hope that information will be helpful to you. We will try to provide additional advice on interpretation if any changes are made in the future.

Best regards,

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